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IN THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA
October Term, 1965

NO. 1319

SECURITY LIFE INSURANCE COMPANY
OF AMERICA,

Petitioner,

versus

W. C. JENNINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK CRENSHAW
Suite 206 Washington Building
Montgomery, Alabama 36104

Attorney for Petitioner

IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Security Life Insurance Company of America, your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 25, 1966.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Alabama entered December 31, 1963 (R. 409-421) is reported in 250 Fed. Supp. 164. The opinion of the Court of Appeals for the Fifth Circuit entered February 25, 1966 has not yet been officially

reported and is printed in Appendix A to this petition. Petition for rehearing was denied on March 29, 1966 without opinion.

JURISDICTION

The judgment of the court below was entered on February 25, 1966. A timely petition for rehearing was denied on March 29, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254 (1).

QUESTIONS PRESENTED

After discovery produced certain records of a governmental agency, an amended complaint was filed. The District Judge did not decide the issues raised by this amendment, but undertook to decide only the issues raised by the original complaint. The opinion showed on its face it was based upon a misconstruction of a written document. The Court of Appeals affirmed on the theory that the correct result was reached. The questions presented are:

1. Where the correctness of the lower court's decision depends upon a determination of fact which has not been made by the trier of fact, is it proper appellate procedure for the Court of Appeals to make such determination of fact from conflicting evidence.

2. Where the lower court fails to consider and decide the issues made by amended pleadings, is it proper appellate procedure for the Court of Appeals to make the determination of facts necessary to permit it to conclude that the correct result was reached.

3. Where the conflicting evidence would justify a contrary result, should the Court of Appeals affirm a decision containing material errors apparent on the face of the record under the rule that the decision should be affirmed if the correct result was reached.

4. Does the Statute, 28 U. S. Code 2111, permit or require the Courts of Appeal to make initial determinations of fact not made by the court below.

STATUTES INVOLVED

The only statute involved is 28 U. S. Code, Sec. 2111, which provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT

On November 11, 1960, the Petitioner purchased from the respondent a building at 400 Lee Street in Montgomery, Alabama, then occupied as Regional Office of the Veterans Administration. The lease then existent on the property would expire on June 30, 1962.

In the fall of 1961, it became known that the Veterans Administration did not intend to renew said lease or to continue in possession of the premises.

On August 28, 1962, petitioner filed the original complaint in the District Court for the Middle District of Alabama, seeking rescission of the purchase on the

ground of fraud and misrepresentation. Federal Court jurisdiction was based upon diversity of citizenship and is not in question.

The original complaint was based upon concealment of the fact that the seller had sought to secure an extension or renewal of the lease and had failed to do so; (R. 3, 5), and had represented that Defendants had no knowledge of any reason why the lease would not be renewed, (Second Cause of Action R. 4).

The defendant Jennings pleaded the general issue and special pleas not here of concern. The Court below, on October 12, 1962, then entered order on Pre-Trial hearing, setting out the issues then made by the pleadings, (R. 31-35).

Thereafter, through discovery proceedings, petitioner secured access to the records of General Services Administration which handled the lease on the property. Included in these files was a letter of March 30, 1960, (App. B, p. 1), showing that the owners had been advised of tentative plans to acquire new and improved space upon expiration of the present lease. Also obtained was a copy of letter of November 23, 1960, (App. B, p. 2-6), requesting program and fund approval to move "effective July 1, 1962."

Petitioner then on May 15, 1963 filed amended complaint, adding a Fourth Cause of Action, (R. 51-56). In addition to the issues, as reflected in the Pre-Trial Order of October 12, 1962, this amendment specifically charged that Defendant had been apprised of the tenant's plans to relocate and concealed the tenant's "tentative plans to relocate into other prem-

ises," (Par. e and f, R. 54). No Pre-Trial Conference was held after this amendment.

The cause was submitted on June 6, 1963. On December 31, 1963, the District Judge rendered judgment in favor of the defendant. The Opinion (R. 410, 250 Fed. Supp., p. 164) copied the issues to be decided from the Pre-Trial Order of October 12, 1962, and made no reference to or attempt to decide the issues raised by the Fourth Cause of Action.

This Opinion (R. 417), contained an inexplicable material error apparent on its face. The letter of November 23, 1960, (App. B, p. 6), specifically required program and fund approval to move "into a new leased facility . . . effective July 1, 1962." The District Court construed this as a request

> "for a program and fund approval for a new federal building in Montgomery, Alabama. This request asked that the program 'be phased out in a six to ten year period.' Thus, it was impossible, in view of the chronology of events reflecting the Government's intentions, for Jennings or any of those acting for or upon his behalf to know, or even have any basis for believing, on November 11, 1960, that the Government intended to vacate 400 Lee Street." (R. 418, 250 Fed. Supp. at p 168)

Appeal was duly taken to the Court of Appeals for the Fifth Circuit and these material errors were assigned. The case was argued and submitted to that Court on November 20, 1964. Fifteen months later, with no reference to these material errors apparent on the face of the record, that Court affirmed on the "view that the correct result was reached," (App. A).

Petition for rehearing was promptly filed. This petition pointed out the probable conflict with the decision of this Court in *Securities and Exchange Commission v. Chenery,* 318 US 80; the probable conflict with the decision of the Eighth Circuit in *Spann v. Commercial Standard Ins. Co.,* 82 F. 2d 593, 600; the construction of 28 U. S. Code 2111, under the rule of *McCandless v. United States,* 298 US 342, 347-8. This petition for rehearing was denied on March 29, 1966 without opinion.

REASONS FOR GRANTING THE WRIT

1. The petition brings before the Court an important question of federal appellate procedure which should be settled by this court.

2. The Court of Appeals so far departed from the usual course of federal appellate procedure as to call for the exercise by this Court of its power of supervision.

3. The Court of Appeals departed from its function as a court to review the decision below to see if material error had been committed; and assumed the function of a trial court to make an original determination of disputed issues of fact.

4. The decision of the Fifth Circuit fails to apply the rule of *McCandless v. United States,* 298 U. S. 342, that an erroneous ruling relating to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. It is in conflict with the decision of this Court in *Securities and Exchange Commission v.*

Chenery, 310 U. S. 80, 88, where it was held that the rule of affirmance, if the result was correct, should not be applied if such correctness depended upon a determination of fact which only the trier of fact could make, but which has not been made. The decision of the Fifth Circuit also conflicts with the decision of the Eighth Circuit in *Spann v. Commercial Standard Ins. Co.,* 82 F. 2d 593.

5. The District Judge failed to pass on the issues made by the amended complaint. The reason assigned by the District Judge for his conclusion was a patent misconstruction of the letter of November 23, 1960, (App. B, p. 6). These material errors required reversal unless it affirmatively appeared that they were not prejudicial. To determine that the correct result was reached in spite of these material errors necessarily required the Court of Appeals to make an initial determination of fact from evidence which it did not hear. In *Securities and Exchange Commission v. Chenery,* 310 U. S. 80, 88, this Court applied to appeals from administrative bodies, the same rule applicable to jury trials, that the appellate court could not make a determination of fact properly made only by the trier of fact. Unless the same rule is applied to appeals in equity cases tried without a jury, the Courts of Appeal will be required to try every case de novo on the printed record and become trial courts rather than courts of review.

The question presented is of continuing importance to the administration of justice and to orderly appellate procedure.

CONCLUSION

To make effective the holding in *McCandless v. United States* and *Security and Exchange Commission v. Chenery*, and to assure uniform appellate procedure in the various circuits, the petition for a writ of certiorari should be granted.

Respectfully submitted

Jack Crenshaw

Attorney for Petitioner

May 6, 1966

Jack Crenshaw
Suite 206 Washington Building
Montgomery, Alabama

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Messrs. Walter Knabe and M. Roland Nachman, Attorneys for Respondent, by mailing a copy thereof, postage prepaid, to them at their respective addresses, 57 Adams Avenue, Montgomery, Alabama, and First National Bank Building, Montgomery, Alabama, on this the 6 day of May, 1966.

Jack Crenshaw

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21305

SECURITY LIFE INSURANCE COMPANY
OF AMERICA,

Appellant,

versus

W. C. JENNINGS,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF ALABAMA.

(February 25, 1966.)

Before JONES and BELL, Circuit Judges, and
HUNTER, District Judge.

PER CURIAM: In this diversity case the findings and conclusions of the district court are set forth in its opinion in *Security Life Insurance Company of America v. W. C. Jennings*, ... F. 2d Supp. . . . . It is our view that the correct result was reached by the district court and, therefore, its judgment is

AFFIRMED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX B

1

Mr. Neil R. Smart
Manager, Veterans Administration
Regional Office
400 Lee Street
Montgomery 4, Alabama

March 30, 1960
4 PBA

Dear Mr. Smart:

Thank you for your letter of March 14 concerning space for the VA Regional Office, Montgomery, Alabama.

We have informally advised one of the owners of the Bear Building that our tentative plans contemplate the acquisition of new and improved space for your agency upon expiration of the present lease. However, since this proposed action is only in the preliminary planning stage, subject to detailed study, documentation, and subsequent approval by higher authorities, this information should be regarded as administratively confidential.

The cooperative and understanding attitude reflected in your letter is genuinely appreciated. You may be assured that we will endeavor to improve your space at the earliest practicable date so as to provide more efficient and comfortable working conditions for all of your employees.

I am looking forward to meeting you and trust that you will be able to visit Atlanta in the near future.

Sincerely yours

W. H. SANDERS
Regional Director
Public Buildings Service

CC: 4 PD-2
4 PAO
4 PR

November 23, 1960
4 PBA

Asst. Commissioner for Buildings Management,
P.B.S., GS Building, Washington, D. C.

Regional Director, PBS,
Atlanta, Georgia

Request for Program and Fund Approval
Consolidated Project, Montgomery, Alabama

I. *Background*

The Community Plan for Montgomery, Alabama, is being revised and will be submitted to your office in the immediate future. This request for program and fund approval is in accordance with the revised community plan.

A new Federal Building has been proposed for Montgomery but is recommended to be phased in a six to ten year period. Therefore, the plan presented herein will have no adverse effect upon this project.

To provide you with information on the buildings under consideration in this memorandum, the following data are given:

A. *BEAR BUILDING.* This structure is approximately 60 years old and prior to occupancy by the Veterans Administration Regional Office on April 15, 1947, was used as a lumber supply warehouse. The entire net rentable area of 88,510 square feet is assigned to the VA. As its former use implies, the building is located in a warehouse section

of the city and is non-functional, which precludes an efficient layout. It also provides minimal net usable area, presents a very unbecoming appearance, and creates a constant source of maintenance complaints.

The annual rental rate for the Bear Building is $179,600, plus $10,000 per annum for electricity, or $2.14 per square foot completely serviced. (This does not include the cost for guard service.)

A detailed study of the VA Regional Office activities was made and a templated layout prepared for a hypothetical building. This layout shows that the agency can be efficiently housed in a new functional building in approximately 68,000 square feet, or approximately 20,510 square feet less than that now assigned.

Our lease on the Bear Building expires June 30, 1962, and if the agency is to be provided space in a new location, it is necessary that all clearances be completed by the first of the calendar year.

B. *OLD POST OFFICE BUILDING.* This building was erected in 1885 and, although structurally sound, it has outlived its functional use. It is in the heart of downtown Montgomery and provides little parking space.

Of 42,700 square feet gross area, only 22,475 square feet are not assignable for agencies use.

The lower floors have been provided with window airconditioning units, but a central cooling system is not practical due to the cost involved.

Operating costs are approximately $30,600 and minor repairs $3,600 per year. In addition, $14,000 is earmarked for interior and exterior painting in Fiscal Year 1962.

We recommend that these two outdated, nonfunctional buildings be vacated. The lease on the Bear Building should be allowed to expire on June 30, 1962, and the Old Post Office Building declared excess and disposed of on the open market.

II. *Present Situation*

In addition to the VA Regional Office, we also propose to relocate Selective Service System State Headquarters and Farmers Home Administration into the new leased facility.

A tabulation of the details of the proposed consolidation is as follows:

Agency	*Present Area*	*Present Cost*	*Proposed Area*	*Proposed Cost*	*Additional Cost*
Veterans Administration	88,510	$189,600	68,000	$238,000	$48,400
SSS, State Headquarters*	10,000	14,000	6,700	23,450	9,450
Farmers Home Adm.	2,800	7,003	2,650	9,275	2,272
ASC State Office*	8,146	Old P.O.	7,000	24,500	24,500
ARS	1,961	Old P.O.	2,800	9,800	9,800
Plant Pest Control	668	Old P.O.	700	2,450	2,450
Agri., Grain Branch	1,186	Old P.O.	1,500	5,250	5,250
Federal Crop Insurance	2,723	Old P.O.	1,600	5,600	5,600
H&H Finance*	1,376	Old P.O.	700	2,450	2,450

Fish and Wildlife	220	Old P.O.	150	525	525
Air Force Reserve*	871	Old P.O.	375	1,313	1,313
Bureau Apprenticeship	347	Old P.O.	375	1,313	1,313
	118,808	$210,603	92,550	$323,925	$113,322

Present Area	118,808 ft.
Proposed	92,500 ft.
Area Reduced	26,558 ft.

*Reimbursable Agencies

Present rental cost	$210,603
Current Operating Cost, P. O. Bldg.	30,600
Total Cost	$241,203

	OE	*Reimbursable*	*Total*
Proposed Cost of Building	$286,212	$37,713	$323,925
Less Current Total Cost	241,203	—	241,203
Additional Funds Required	$ 45,009	$37,713	$ 82,722

III. *Action Requested*

Proposal 1. The attached layout has been reviewed and accepted by the Veterans Administration Regional Office Manager and the Chief Medical Officer; however, it is suggested that it be cleared with the VA Central Office. The layouts of the various components of the Department of Agriculture have also been cleared locally, but we suggest that these should also be cleared with Mr. Mackey White. No part of the project has been cleared by the Central Offices of the agencies involved as to reimbursable commitments for funds. ASC space is generally considered reimbursable. However, since this agency is being moved from Government-owned into leased space, there is doubt as to the responsibility of cost in this instance. Please let us have a ruling on the matter. Program and fund approval is requested to consolidate the twelve agencies into a new leased fa-

cility at an increased QE-PBS cost of $45,009 per annum, presuming reimbursement as outlined above, effective July 1, 1962. A lease in excess of five years is not anticipated. It is also requested that authorization be granted to vacate and dispose of the Old Post Office Building.

Proposal 2. In the event that immediate disposition of the Old Post Office Building cannot be effected as the first proposal requires, we recommend that new space be obtained for the VA, SSS State Headquarters, and Farmers Home Administration. Additional funds in the amount of $60,122 would be required with $9,450 being reimbursable.

An early answer will be appreciated.

cc: 4 PL
4 PB-2
4 PRB

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IN THE

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OCTOBER TERM, 1965.

No. 1319

SECURITY LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

W. C. JENNINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Respondent in Opposition.

M. R. NACHMAN, JR.,
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Attorneys for Respondent.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Respondent in Opposition.

OPINIONS BELOW.

The memorandum opinion of the District Court of December 31, 1963 (Appendix A of this brief, p. 7) is reported in 250 F. Supp. 164. The *per curiam* opinion

of the United States Court of Appeals for the Fifth Circuit (Appendix A of petition) is reported at 356 F. 2d 942.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 25, 1966. Rehearing was denied on March 29, 1966. Respondent is not advised of the date of filing of the petition for writ of certiorari, but a copy was received by counsel for respondent on May 7, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether this Court will review extensive and detailed findings of fact which form the basis of the judgment of the District Court and which were found to be correct by the Court of Appeals, in the absence of any showing of clear or exceptional error.

STATEMENT.

Petitioner, Security Life, as buyer, sued in the District Court below to rescind and abrogate a conveyance from respondent Jennings of an office building, and the underlying sales agreement; and to restrain Jennings from enforcing the agreement and an accompanying purchase money note and mortgage. Security alleged fraud and misrepresentation on the part of Jennings on the basis of which it claimed to have been induced to purchase the property. Security also sought damages.

Jennings denied the allegations of misrepresentation, intent to deceive, fraudulent inducement and confidential and fiduciary relationship; and counterclaimed, moreover,

seeking specific performance of Security's contractual obligations and damages.

The District Court tried the case without a jury. It heard oral testimony for two days, and considered numerous depositions and documentary exhibits (only two of which are excerpted in the appendix of the petition). The District Court, in accordance with its extensive findings of fact and conclusions (Appendix A of this brief) denied the relief which Security had sought, and ordered Security to perform specifically all of the terms and conditions of its contract with Jennings.

The District Court found that Jennings had not been guilty of any fraud or misrepresentation and that Security had no legal justification for its refusal to honor the contract of sale according to its terms. The District Court found, moreover, that Security, through its President, had made its own investigation before agreeing to purchase the building and had relied on that investigation. The District Court also found that, while there was no confidential or fiduciary relationship between Security or its officers (the buyer) and Jennings (the seller), Jennings, and others acting for and on his behalf, revealed fully to Security's President and other officers with whom they dealt, all of the information which they had about the Government's intentions regarding the lease in question. The District Court found, in short, a full and complete disclosure by seller of all facts in his possession.

The precipitating cause for Security's attempt to violate its contract of purchase was the decision of the building's sole tenant, the United States Government, not to renew a lease. The District Court found that the Government had not made a determination about renewal of the lease prior to the time Security purchased the building from Jennings.

Security appealed from the District Court's order and the Court of Appeals, *per curiam*, affirmed with the ob-

servation that "the correct result was reached by the district court."[1]

---

[1] The petition, absolutely contrary to the record, argues as its sole point that the District Court did not decide the issues raised by an amendment to the complaint and that the Court of Appeals made the factual determination for it. It would be an idle waste of this Court's time to re-analyze a record which fully demonstrates the District Court's consideration and determination of each issue raised in this fourth cause of action. Moreover, the District Court—fully supported by the oral testimony and documentary evidence—found against Security on each of the issues and on each of the "wrongs" which it charged to Jennings and which it made the basis of its suit for rescission and its opposition to specific performance. This specification of "wrongs" came in the cross-examination of Security's Vice President, Atherton (R. 110):

> "Q. * * * Security is the Plaintiff in this case; would you tell the Court specifically what Mr. Jennings did wrong that he is being charged with now, and on the basis of which Security is asking that this real estate contract be rescinded?
>
> "A. What he did wrong?
>
> "Q. Yes, sir?
>
> "A. I thought all the way through our negotiations with Mr. Jennings that he brought out it would take at least five years or more [47] for any new building to be created, or worked out, and that it was more or less a matter of form that they would renew or exercise on five one year options, or we wouldn't have gone into the deal on a two year firm lease.
>
> "Q. Anything else?
>
> "A. That he never told me of the letter, I believe it was March 24, or the other letter that has been entered."

ARGUMENT.

This petition presents nothing but a question of whether the District Court's factual findings are correct, as the Court of Appeals found them to be. An examination of the District Court's memorandum opinion (Appendix A) makes plain that it covered all issues in controversy. The petition does not present, and cannot present, any of the reasons specified in Rule 19 of the Rules of this Court as justifying the exercise of discretion to review on certiorari. This case involves an attempt by petitioner to avoid contractual obligations on an assertion of fraud and misrepresentation. The case turns completely on questions of fact. These facts have been determined by two courts adversely to petitioner on voluminous and quite substantial supporting testimony. The record, indeed, impelled the conclusion of the Court of Appeals that the correct result had been reached. There is no conflict of decisions on questions of law. And the questions raised by the petition are based on erroneous assumptions of fact and are, moreover, not of general importance.

The concurrent findings of the two courts below are "final here in the absence of very exceptional showing of error." **Comstock v. Group of Institutional Investors,** 335 U. S. 211, 214, and numerous cases there cited for this "seasoned and wise rule of this Court." The petition wholly fails to demonstrate that exceptional error—or indeed any error—was committed.

What this Court has said of Rule 52 (a) of the Federal Rules of Civil Procedure—the "clearly erroneous rule"—is applicable here, namely, that there is "no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses." **U. S. v. Oregon State Medical Society,** 343 U. S.

326, 332. This petition presents nothing more than an effort to get a third court to examine the testimony in this record and to decide factual questions already twice determined adversely to petitioner. It is, accordingly, totally lacking in merit.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

.....

M. R. NACHMAN, JR.,

.....

WALTER J. KNABE,
Counsel for Respondent.

STEINER, CRUM & BAKER,
1109-25 First National Bank Building,
Montgomery, Alabama 36101,
Of Counsel.

Certificate of Service.

I, M. R. Nachman, Jr., of Counsel for Respondent and a member of the bar of this Court, hereby certify that I have mailed a copy of the above and foregoing brief, postage prepaid, to Jack Crenshaw, Esquire, Washington Building, Montgomery, Alabama, as Counsel for Petitioner.

This ..... day of May, 1966.

.....

M. R. Nachman, Jr.,
Of Counsel for Respondent.

APPENDIX A.

(Filed Dec. 31, 1963, R. C. Dobson, Clerk.)

In the United States District Court
For the Middle District of Alabama,
Northern Division.

Security Life Insurance Company of America,
Plaintiff,
vs.
W. C. Jennings,
Defendant.
Civil Action.
No. 1841-N.

Memorandum Opinion.

This cause was submitted to the Court without a jury on the issues as made up by the pleadings and the proof. Upon consideration of this evidence, consisting of the testimony, both oral and by deposition, of the several witnesses, together with the numerous exhibits thereto, this Court now proceeds to make and enter the appropriate findings of fact and conclusions of law, embodying the same in this memorandum opinion.

On November 11, 1960, Security Life Insurance Company of America, acting through its president and principal stockholder, Frank Leu, purchased from the defendant, W. C. Jennings, a certain piece of property located at 400 Lee Street, Montgomery, Alabama, on which there was a building leased at that time to the General Services Administration of the United States and occupied by the Regional Office of the Veterans Administration. As the purchase papers recited, this lease expired on June 30, 1962, and the United States had an option under the lease to renew same for an additional period of five years. The

execution of the purchase papers was the culmination of negotiations between Security Life Insurance Company's president, Frank Leu, and the defendant Jennings which began in early 1960.

As this Court's pretrial order recites, Security Life Insurance Company claims fraud of the defendant Jennings in the sale of this property to Security. The sale of the property, as the documents that were executed between the parties reflect, was for the sum of $900,000.00, $405,412.88 of which was represented by Security's assuming certain mortgages, the balance being represented by a note executed to the defendant Jennings in the sum of $494,587.12, said note being payable in accordance with an agreement between Security and Jennings that was dated November 11, 1960; the note was secured by a subordinate mortgage on the transferred property. The balance due Jennings was to be paid by an arrangement whereby Jennings was to secure single premium life insurance policies with Security as insurer, and the net premiums would be credited against the balance due Jennings.

The plaintiff, Security, says that the defendant's fraud was in the inducement in that W. C. Jennings induced the plaintiff, who was at all times material to this litigation acting through its president, Frank Leu, to purchase this property; that said inducement was in breach of a confidential and fiduciary relationship which existed between Jennings and Leu, who was acting for the plaintiff; that said breach grew out of the suppression and concealment from the plaintiff of the material fact that prior to the sale the defendant Jennings had sought and failed to secure a renewal or extension from the United States Government of the lease on the property which called for a rental of $179,000.00 per annum. Plaintiff Security says that in purchasing the property in question it relied upon this confidential and fiduciary relationship which

existed between Jennings and Leu and relied upon the concealment and misrepresentation of this material fact by Jennings.

The second theory upon which the plaintiff bases its case is that the defendant Jennings misrepresented to Security a material fact, which misrepresentation was made wilfully to deceive and which misrepresentation was acted upon by the plaintiff Security, said misrepresentation being "that the defendant had no knowledge of any reason why said lease would not be renewed."

The third theory upon which the plaintiff asks this Court to give it relief is that the defendant Jennings misrepresented a material fact, upon which misrepresentation the plaintiff acted, in that defendant induced "the plaintiff to believe" that the lease would continue beyond June 30, 1962, and would be renewed and extended. The plaintiff asks this Court to:

1. Set aside and cancel the sale of November 11, 1960, and restore the parties to their former positions;

2. Cancel the mortgage from plaintiff to defendant;

3. Restrain defendant from suing on the note or foreclosing the mortgage; and

4. Render a judgment to plaintiff for plaintiff's damages growing out of and as a proximate consequence of the defendant's conduct and/or misconduct, as aforesaid.

Defendant Jennings pleads the general issue. As recited in the pretrial order of this Court made and entered herein on October 12, 1962, this general issue plea includes a specific denial of any misrepresentation, any intent to deceive, any fraudulent inducements, and a further specific denial of any confidential and fiduciary relationship between Jennings and Leu that may have related to the sale of the property involved. In addition to this general

plea, the defendant Jennings pleads specially that Security's causes of action are separately and severally barred by the statute of limitations of one year as that statute is set out in Title 7, § 42, Code of Alabama, 1940, as revised. The defendant Jennings further says that each cause of action relied upon by Security is barred by laches, of which Security has been guilty.

Jennings counterclaims by asking this Court to require Security to specifically perform its obligations as reflected by the note and contract between the parties, both of which were dated November 11, 1960, and further claims of Security for Security's breach of the contract of November 11, 1960, by Security's failing and refusing to issue policies of insurance upon applications from Jennings and failing and refusing to make payments of interest and/or principal on the note in question. Jennings says that he has been damaged as the proximate consequence of Security's breach of contract in the amount of $75,000.00. For his second counterclaim, defendant Jennings claims of Security interest on the note dated August 1, 1960.

To each of these counterclaims separately and severally, Security pleads the general issue and pleads specially a "setoff" in that Jennings collected approximately $45,000.00 in rents on the property in question, which rents plaintiff was entitled to collect, and that the plaintiff is entitled to set off that amount against any interest or damages that may be due Jennings.

The evidence in this case reflects that, at the suggestion of and for the convenience of Security, the purchase was backdated to August 1, 1960. As a result of this backdating, Jennings had collected rent from the Government for the period from August 1 to November 11, 1960, which, according to the agreement between the parties, belonged to Security; out of this rent money that Jennings collected he paid operating expenses, interest to prior mortgages,

and other items which were, according to the contract between the parties, the obligation of Security after August 1, 1960.

Security has never paid any interest to Jennings and has recognized only six of the seven single premium policies written by Jennings. Security has announced that it will not pay interest to Jennings and that it will not recognize or issue additional policies.

The evidence as presented to this Court further reflects that in the spring of 1961 the Government, acting through the General Services Administration, made known publicly that it would seek bids for the construction of a building to be located in Montgomery, Alabama, and to house the Veterans Administration Regional Office. At this same time, the General Services Administration still had under consideration the retention of the 400 Lee Street Building as an alternative plan.

From the spring of 1961 until the summer of 1962, Security, acting through its president, Leu, and acting through Congressman Sikes of Florida, actively sought to work out a satisfactory arrangement with the Government whereby the Veterans Administration would continue to occupy the building in question. When it was unable to do so (and not until it was unable to do so), Security brought this action to abrogate its agreement with the defendant Jennings. The contention by Security in this case that Jennings knew at all times that the Government intended to vacate the building in question at the expiration of its current lease is contrary to the overwhelming evidence in this case. The contention on the part of Security that its president, Frank Leu, relied entirely upon what Jennings told him and made no investigation as to whether the Government would renew the lease in question before Security purchased the building is absolutely contrary to the evidence in this case. As a matter of fact,

the evidence reflects that Leu was and is an experienced businessman who owned over ninety per cent of the stock in a $15,000,000.00 insurance company, who organized and helped manage other insurance companies. In the transaction in question, Leu did not abandon this business experience, and he did not fail to exercise his common sense in making a complete and thorough investigation—to the extent that he was satisfied that the lease on behalf of the Veterans Administration by the Government would be renewed. For instance, the plaintiff, Security, wrote General Services Administration on April 16, 1962, a letter signed by its vice president, concurred in by its president, and approved before mailing by its general counsel. This letter reflects that Leu, acting for Security, did exactly what any prudent businessman would have done in a transaction of this size. He made his own investigation. This letter, as here pertinent, reflected:

> "The Security Life and Accident Insurance Company, through its president, Mr. Frank Leu, before purchasing this building now occupied by the Veterans Administration, made every effort possible through the General Services Administration offices in Atlanta and Washington to determine if there were any plan in the near future whereby the General Services Administration would not need this building. The information that he received was favorable, and he then proceeded to purchase the building."

Other cogent evidence in this case that Security actively and independently investigated the matter as to whether or not there would be a renewal of the lease in question is reflected in the letter of September 21, 1961, written by Security's congressional representative, Congressman Sikes of Florida, who was also on the board of directors of a Florida insurance company with Security's President Leu. Congressman Sikes wrote the Administrator of the General Services Administration, with a copy to the

Chairman of the House Committee on Appropriations; in this letter he described the investigative activity which preceded Security's purchase of the building from Jennings as follows:

> "The building now used by the VA in Montgomery was acquired only a short time ago by the Security Life and Accident Insurance Company of Mobile. This was done only after the head of the VA in the Montgomery office told representatives of the company that they were satisfied with the building and had no plans to move to other quarters. This, I find, was substantiated when members of my staff made inquiries of the GSA and the VA at approximately the same time, at which time my office was told that there were no plans to change VA quarters in Montgomery and that it was anticipated the lease would continue in effect. **Without these assurances, obviously Security Life and Accident would not have invested in this building.**" [Emphasis supplied.]

The evidence not only reflects that the defendant Jennings and the President of Security occupied no confidential or fiduciary relationship but further reflects that Defendant Jennings, and others acting for and upon his behalf, revealed fully to Leu, and to Security's officers with whom they were dealing, all of the information they had about the Government's intentions regarding the lease in question. This disclosure was full and complete and extended throughout the period of negotiations. This disclosure included correspondence with the Government and all information which Jennings, and those acting for and on his behalf, had available to him regarding the intentions of the General Services Administration and the Veterans Administration. The disclosure included a letter of March 4, 1960, wherein the Government informed one of Jennings' agents, Erle Cocke, Jr., that as of that date it did not elect to accept a binding five

year lease term beginning in April, 1960, but preferred "the terms and tenure of the existing lease" under which it had an option to renew for a full five year period. The evidence in this case further reflects that prior to the purchase of this building Leu had available to him information set out in a letter dated October 12, 1960, written by Cocke, acting for Jennings, to another of the agents acting for and on behalf of the defendant Jennings. The pertinent portion of this letter reads as follows:

> "On the item of the lease, General Services has no thought of a lease. They have so many places that are a real headache to them that Montgomery's VA situation is not one. Also, inasmuch as it is two years off, anything that has transpired to them is 'quite premature'.
>
> "I really think that Frank Leu's inquiry has helped. Christie was of the opinion that we had refinanced the building. I didn't tell him otherwise. . . ."

As reflected in this letter, Leu had made personal inquiry of the General Services Administration regarding its intentions as to the renewal of the lease.

In determining whether or not Jennings knew at the time of the transaction in question the intention of the Government, it is obviously material and relevant to determine from the evidence in this case exactly what the Government's intentions were regarding the renewal of the lease on the building in question. In that connection, the evidence in this case reflects that as of November 11, 1960, the Government had not rejected an extended occupancy of the 400 Lee Street Building beyond the June 30, 1962, expiration date; the Government had not closed the door to continued negotiations on this lease as of March 4, 1960, or as of October, 1960. Thus, the evidence in this

case fully convinces this Court that the Government had not made a determination as to the renewal of the lease in question prior to the time Security purchased this building from Jennings. In this connection, it is significant that, twelve days after the purchase date, the Regional Director of the General Services Administration in a letter dated November 23, 1960, requested its central agency in Washington for a program and fund approval for a new federal building in Montgomery, Alabama. This request asked that the program "be phased out in a six to ten year period." Thus, it was impossible, in view of the chronology of events reflecting the Government's intentions, for Jennings or any of those acting for or upon his behalf to know, or even have any basis for believing, on November 11, 1960, that the Government intended to vacate 400 Lee Street.

As stated above, because of the backdating of the contract to August 1, 1960, certain adjustments were necessary since Jennings had collected rents on the property in question from August 1 through November 11, 1960; the evidence in the case insofar as this adjustment is concerned reflects that Jennings owed Security $9,753.50. This figure was entered on Security's journal on November 11, 1960. There is no evidence reflecting that Jennings owed Security $45,000.00 as claimed in plaintiff's setoff. Therefore, the principal balance of $264,403.96 which Jennings claims is due on the note, since it takes into account this figure of $9,753.50, is still due from Security to Jennings. In addition, the evidence in this case reflects that, in violation of its contractual obligation, Security has never paid any interest to Jennings and, as of May 28, 1962, owed Jennings the sum of $41,730.81 as interest. Further, as stated earlier in this opinion, the evidence reflects that Security has recognized only six of the seven single premium policies which were written and controlled by Jennings pursuant to the agreement.

The Alabama statutory law relating to fraud, misrepresentation, and deceit is set out in Title 7, §§ 108, 109, 110, and 111, 1940 Code of Alabama. Rescission of contractual obligations under the authority of these statutes, and under the authority of the common law, may only be upon "clear and convincing proof." **Barley v. Wright**, 233 Ala. 283, 171 So. 247. See also: **Birmingham Broadcasting Company v. Bell**, 259 Ala. 656, 68 So. 2d 314; **Cartwright v. Braley**, 218 Ala. 49, 117 So. 477, and **Majestic Coal Company v. Anderson**, 203 Ala. 233, 82 So. 483.

As noted above, there was no confidential relationship existing between Jennings as seller and Leu, acting for the purchaser, Security. **Cross v. Maxwell**, 263 Ala. 509, 83 So. 2d 211, and **Fitzpatrick v. Shine**, 254 Ala. 323, 48 So. 2d 220. Moreover, because of Leu's business experience and the equal access to Leu and other of Security's agents of all the material information concerning the renewal of the lease on the property in question, there was no reliance, under the laws of Alabama, by Security upon any representation or suppression by Jennings. **Birmingham Broadcasting Company v. Bell**, supra; **Bynum v. Rucker**, 235 Ala. 353, 179 So. 241, and **Myers v. Moody**, 259 Ala. 638, 67 So. 2d 891.

Therefore, it is clear to this Court that the plaintiff, Security Life Insurance Company, is not entitled to the relief it seeks in this case, and in addition it is equally clear that defendant Jennings should be and must be, on the evidence in this case, awarded a portion of the relief which he seeks in his counterclaim. This relief will not include the award of any special damages, but will include specific performance and a requirement that Security fully adhere to its contractual obligation.

In summary, this Court finds that Jennings was not guilty of any fraud in connection with the sale and transfer of the 400 Lee Street Building to Security; Security

bought this property from Jennings only after a thorough and independent investigation by its president, Frank Leu, and other officers and officials acting for and upon behalf of the company; this investigation being into the question of whether the General Services Administration, acting for the Government of the United States, would renew or extend the then existing lease on this building after its expiration date of June 30, 1962, thus, plaintiff Security is not entitled to rescind the contract for the purchase of this building from defendant Jennings and must be required to specifically perform all of the terms and conditions of this contractual arrangement. In this connection, this Court specifically finds that Security has violated its contractual obligations under this contract of purchase of August 1, 1960. As stated above, these violations consist of Security's not having paid any interest to Jennings and Security's failing to recognize, as it was required to do under the contractual arrangement, the seven single premium policies which were written and controlled by Jennings, and, specifically, Security's failing to recognize policy No. 2007, issued on the life of Erle Cocke, Jr. The evidence reflects that the principal balance due on the note from Security to Jennings dated August 1, 1960, this note having been given pursuant to the purchase of the building, is $264,403.96. This figure takes into account the sum of $9,753.50 that the evidence reflects is due from Jennings to Security because of the backdating of the contract of purchase from November 11, 1960, to August 1, 1960. The determination that this is the amount due assumes the recognition of all policies, including policy No. 2007, that were issued by Security pursuant to the contract between Security and Jennings. As of August 12, 1963, Security owed defendant Jennings $44,521.99 as interest. In addition, Security owes interest from August 12, 1963. All insurance policies written by Security pursuant to the contract between Security and Jennings are held to be valid. This includes, as stated

above, policy No. 2007 on the life of Erle Cocke, Jr. All of the single premium policies issued by Security pursuant to the arrangement with Jennings must be honored according to their terms; all such policies are binding obligations upon the Security Life Insurance Company of America.

Because of the findings and conclusions reached by the Court, it is unnecessary to this cause to rule on Jennings' statute of limitations and laches defenses.

This Court declines to order the payment of attorneys' fees in this case to Jennings' attorneys since the litigation grew out of a good faith controversy between the parties, and the relief being granted is not the type of "note collection" relief contemplated by the provision in the note from Security to Jennings that concerns the payment of attorneys' fees.

An appropriate order will be entered in accordance with the foregoing.

Done, this the 31st day of December, 1963.

Frank M. Johnson, Jr.,
United States District Judge.